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September 7, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

REDACTED – FOR PUBLIC INSPECTION

Re: *WT Docket No. 06-114*
Applications for Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.

Dear Ms. Dortch:

On behalf of MTA Communications, Inc., d/b/a MTA Wireless, and in accordance with the instructions in the protective order in this docket, we are herewith filing a redacted version of MTA Wireless' Reply to Applicants' Filings, the confidential version of which was filed with the Commission yesterday in hard copy form. Please contact the undersigned should you have any questions regarding this matter. Thank you.

Sincerely yours,

Stefan M. Lopatkiewicz

Enclosures

cc: Erin McGrath, Wireless Telecommunications Bureau, FCC
Susan Singer, Wireless Telecommunications Bureau, FCC
Thomas Gutierrez, Counsel for Denali PCS, L.L.C. and Alaska DigiTel, L.L.C.
Carl W. Northrop, Counsel for General Communication, Inc.
Elizabeth Ross, Counsel for ACS Wireless, Inc.

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for the Assignment of Licenses from	)	
Denali PCS, LLC to Alaska DigiTel, LLC and	)	WT Docket No. 06-114
the Transfer of Control of Interests in Alaska	)	
DigiTel, LLC to General Communication, Inc.	)	
	)	

To: The Commission

MTA COMMUNICATIONS, INC. d/b/a MTA WIRELESS
EPLY TO APPLICANTS' FILINGS

MTA COMMUNICATIONS, INC.
d/b/a MTA WIRELESS

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September 6, 2006

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SUMMARY

The Applicants' assertion, in their Joint Opposition to MTA Wireless' Supplementary Comments in support of its Petition to Deny, that the transfer of control of Alaska DigiTel to GCI will not be "substantial" is procedurally misleading. Because Applicants have applied to secure Commission approval of their Transaction prior to consummating it, the Commission must, in any case, determine whether the Applications will comport with the public interest. The Applicants' assertion that no substantial transfer of control of DigiTel will take place does not lessen either the public interest standard to be met, or Applicants' burden in meeting it.

GCI's acquisition of a 78-percent ownership interest in the combined DigiTel/Denali entity will result in a *de jure* transfer of control as a matter of law. In addition, the specific set of factors presented in the record confirm that the Commission's standards establishing transfer of *de facto* control are also met in this case.

As a result of GCI's control of the reorganized DigiTel post-closing, as a matter of both law and fact, the DigiTel/Denali PCS spectrum must be aggregated with that of GCI when the Commission evaluates the potential anti-competitive effects of the Applicants' Transaction. In addition, GCI's relationship with Dobson is materially broader than a normal resale arrangement. That relationship is relevant to the Commission's determination of whether consummation of the Transaction is likely to lead to coordinated activity among major surviving competitors in the Alaska wireless market. In this regard,

should be evaluated as part of this determination.

MTA Wireless' participation in the current AWS auction is irrelevant to the Commission's consideration of spectrum aggregation in this matter, since any spectrum secured by MTA Wireless in the auction will not become operationally available for at least four years.

MTA Wireless opposes the Applicants' efforts to preclude ACS Wireless from participating in this proceeding. ACS Wireless' filing was submitted in response to the Commission's establishment of this permit-but-disclose docket. MTA Wireless believes ACS Wireless will help the Commission develop a complete record in this docket and supports its recognition as a party for all purposes.

The Applicants' have still failed to identify for the Commission any public interest benefit resulting from their proposed Transaction. MTA Wireless renews its petition that the Commission deny the Applications as contrary to the public interest. Alternatively, it has demonstrated that "substantial and material" questions exist regarding whether the Transaction will serve the public interest, and submits that the Applications should be designated for evidentiary hearing to enable a full evaluation of all relevant factors.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
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Denali PCS, LLC to Alaska DigiTel, LLC and	)	WT Docket No. 06-114
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DigiTel, LLC to General Communication, Inc.	)	
	)	

To: The Commission

MTA COMMUNICATIONS, INC. d/b/a MTA WIRELESS
REPLY TO APPLICANTS' FILINGS

On July 24, 2006, MTA Communications, Inc., d/b/a MTA Wireless, filed Supplementary Comments in support of its Petition to Deny the applications in this proceeding ("Supplementary Comments"). The Supplementary Comments analyzed the documents produced into the record by applicants Denali PCS, LLC ("Denali"), Alaska DigiTel, LLC ("DigiTel") and General Communication, Inc. ("GCI") (hereinafter, collectively, "Applicants") in response to the Commission's order of June 9, 2006. MTA Wireless' analysis demonstrated that the documents underlying the Applicants' proposed transaction by which GCI would purchase a 78 percent interest in DigiTel (the "Transaction"), and those memorializing GCI's relationship with Dobson Cellular Systems, Inc. ("Dobson"), confirm MTA Wireless' argument that consummation of the Transaction would not be in the public interest.

Subsequent to the filing of the Supplementary Comments, the Applicants, in a letter dated August 4, 2006, challenged the filing by ACS Wireless, Inc. ("ACS Wireless") of its Comments/*Ex Parte* Filing and Petition to Intervene in this docket ("ACS Wireless Filing"),

characterizing it as an untimely petition to deny their applications (the "Applications"). On August 8, 2006, the Applicants filed a Joint Opposition to MTA Wireless' Supplemental Comments ("Supplemental Opposition"). Finally, on August 30, 2006, DigiTel produced to counsel for MTA Wireless and ACS Wireless, pursuant to the Commission's protective order in this proceeding, copies of two agreements,

(the "Sprint Agreements"). Production of the Sprint Agreements was made in consideration for a procedural agreement reached among the Applicants, MTA Wireless and ACS Wireless, pursuant to which counsel for ACS Wireless was granted access, in accordance with the terms of the Commission's protective order, to the unredacted versions of documents produced into the record by the Applicants.

MTA Wireless hereby incorporates by reference all of its previous filings made in this proceeding, replies to the Applicants' August 4 and August 8 filings, and comments on the Sprint Agreements. The Applicants' most recent filings reveal a fundamental misunderstanding by the Applicants of the Commission's rules governing applications for transfer of control of wireless licenses. As MTA Wireless will herein demonstrate, the totality of circumstances surrounding the Applicants' proposed Transaction, as revealed through the documents produced and pleadings filed in this proceeding, confirms that a substantial and material question exists whether the Applications will advance the public interest, convenience and necessity as required under the Communications Act. 47 U.S.C. § 310(d).

I. THE TRANSACTION WILL RESULT IN BOTH *DE JURE* AND *DE FACTO* TRANSFER OF CONTROL OF DIGITEL

A. The Assertion That the Transfer of Control Will Not be "Substantial" is Procedurally Misleading

In their Supplemental Opposition, the Applicants finally acknowledge, as they must, that GCI's acquisition of more than 50 percent of the ownership interests in DigiTel will result in a transfer of control.[1] *See* 47 CFR § 1.948(b)(1). They continue to try to cloud the Commission's proper analysis of the impact of this fact, however, by introducing the notion that the purchase will not lead to a "substantial" transfer of control of DigiTel.[2] Given the fact that Applicants have applied for the Commission's consent to the Transaction before consummating it, this is a confusing and misleading digression with which the Applicants hope to distract the Commission from a proper analysis of the merits of their Applications.

In light of the posture of this proceeding, the assertion that the resulting transfer of control will not be substantial is disingenuous and misleading. Section 1.948(c)(1) of the Commission's Rules, cited by the Applicants in this part of their Supplemental Opposition, makes clear that the term "non-substantial" when employed in the context of assignments of licenses or transfers of control is synonymous with "*pro forma.*" The only relevance of determining whether an application for transfer of control is *pro forma* or not is whether the transferor and transferee must seek Commission approval in advance of consummating the transaction ("substantial") or simply provide the Commission with notice after the fact ("non-substantial" or "*pro forma*"). As explained by the Commission in adopting the rule for wireless services that eventually became section 1.948(c)(1), *pro forma* transfers or assignments are those that do not cause a "substantial change in ownership or control" of the license as provided

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1 Supplemental Opposition, at 2.

2 *Id.*, at 5.

in section 309(c)(2)(B) of the Communications Act.[3] Such cases are typically those that involve internal corporation reorganizations or structural changes of the licensee.[4] Because such internal reorganizations and restructurings do not affect the ultimate ownership or control of the licensee, the Commission in its *FCBA Forbearance Order* agreed with the industry proposal that they do not raise consumer issues requiring advance Commission review.[5]

The Commission admonished, however, that applicants for transfers of control will continue to be responsible for determining whether a proposed transaction qualifies as *pro forma* or not.[6] Here, the Applicants made the obvious decision that, because the proposed transaction will result in a substantial change in ownership – *i.e.*, GCI will assume far in excess of a majority equity ownership – they needed to seek prior Commission approval, which they are pursuing in this proceeding.

Viewed in this light, the Applicants' argument that the transfer of control of DigiTel will not be a "substantial" one can be understood for its true purpose: to obfuscate the Commission's analysis as to whether the proposed transfer of control of DigiTel will be in the public interest. In demonstrating whether the Transaction fulfills this requirement, the Applicants plainly bear the burden of proof by a preponderance of the evidence. It is their obligation to convince the

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3 *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion & Order, 13 FCC Rcd 6293 (1998)(hereinafter, "*FCBA Forbearance Order*"), at 6297.

4 *Id.*, at 6302. And *see* examples of such *pro forma* transfer at 6298-99.

5 *Id.*

6 *Id.*, at 6299.

Commission that the potential public interest benefits of their Transaction will outweigh the potential public interest harms.[7]

The Applicants, however, refuse to accept this responsibility. They maintain that the issue of "whether GCI will exercise control over DigiTel" can have "no practical or legal public interest ramifications."[8] Significantly, they fail in their Supplemental Opposition to cite to *one public interest benefit* that could flow from GCI's acquisition of DigiTel, choosing instead only to challenge MTA Wireless' arguments regarding the potential competitive harms that the acquisition will produce.[9] The public interest standard governing approvals of transfer of control is not lessened by the fact that the Applicants claim the DigiTel transfer of control to GCI will not be substantial. They must be held to the proper standard of accountability for their proposed Transaction.

B. GCI's *De Jure* Control of DigiTel Would be "Substantial" and Requires Prior Commission Approval

In Part II of the Supplemental Opposition, the Applicants' engage in an extended argument that GCI's *de jure* control of DigiTel – which they concede will result from the Transaction – is not of significance to the Commission's evaluation of the Applications unless a *de facto* transfer of control is also demonstrated. The fallacy of this line of reasoning derives from a fundamental legal error underlying the Applicants' position. The transfer of *de jure*

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7 *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, FCC 04-255, released October 26, 2004 (hereinafter, *"AT&T-Cingular Order"*), ¶ 40.

8 Supplemental Opposition, at 2-3.

9 The only possible public interest benefit that the Applicants have alluded to in their voluminous pleadings in this docket is an allusion in the applications to the premise that GCI's investment will "result in an infusion of capital" for DigiTel. But this theory has already been debunked by both MTA Wireless (*see* Petition to Deny, at 8) and ACS Wireless (*see* ACS Wireless Filing, at 7-8) pointing out that DigiTel will no longer be an independent competitor in the marketplace, but will instead become part of an enlarged GCI presence.

control to GCI cannot be legally consummated without prior Commission approval, regardless of whether GCI will exercise *de facto* control under the Commission's standards.

To begin with, section 1.948(a) of the Commission's Rules clearly states that the control of a licensee may be transferred only by application to and approval by the Commission. Section 1.948(b)(1) goes on to state that "a change from less than 50% to more than 50% ownership shall *always* be considered a transfer of control." Section 1.948(b)(2) of the Rules then states "[i]n *other* situations a controlling interest shall be determined on a case-by-case basis...." (Emphasis added.)

In the *FCBA Forbearance Order*, the Commission explained:

> "De jure control is control as a matter of law. It is present where a shareholder or shareholders voting together own or control fifty percent or more of the licensee's voting shares....In general, a substantial change in ownership or control occurs when there is a transfer of fifty percent or more of a licensee's stock or a transfer that results in a stockholder whose qualifications have not been passed on by the Commission acquiring at least a fifty percent voting interest in a licensee."[10]

The Applicants, however, quote out of context and rely on a statement made by the Commission in the Notice of Proposed Rulemaking in the *2000 Biennial Regulatory Review* docket governing international services that:

> "A change in *de jure* control is generally considered substantial, but if there is an indication that *de facto* control has not changed, the transfer may be considered *pro forma*, and prior approval is not required."[11]

The Applicants interpret this statement to mean that *de jure* control in itself does not necessarily equate to *de facto* control. Quite the opposite is the case. In its final order in the *2000 Biennial*

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10 *FCBA Forbearance Order*, at 6297-98.

11 *2000 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 15 FCC Rcd 24264, 24270 (2000) ("*2000 Biennial Regulatory Review NPRM*").

Regulatory Review rulemaking, the Commission clarified it prior statement, on which Applicants have erroneously relied, when it held:

> "We adopt the proposal to treat a change from less than 50 percent controlling ownership -- *de facto* control – to 50 percent or more ownership – *de jure* control – as a transfer of control [footnote omitted]. While we understand Verizon's view that an increase of an already controlling ownership interest to an ownership interest of over 50 percent is not always a transfer of control, [footnote omitted] we find that such an increase in ownership level constitutes a change in the type of control, from *de facto* control to *de jure* control, and the Commission should be notified of this change. As we noted, we seek to make our procedures more consistent with those that govern CMRS licenses. *Under the rules, a change from less than 50 percent ownership to 50 percent or more ownership of a CMRS license is always considered a transfer of control."* (Emphasis added)[12]

The Commission thus made clear that the instances in which a *de jure* transfer of control does not qualify as "substantial" are limited to those in which the *de facto* control of the legal owner is *already* established. In that circumstance, the subsequent acquisition of legal ownership by the *de facto* controlling interest is merely *pro* forma, and is satisfied by giving the Commission notice after the fact.

The Applicants here seek to turn that proposition on its head by arguing that the standard of *de facto* control can limit the instances in which a *de jure* transfer will be considered substantial. The Commission's case law shows quite the opposite, demonstrating that *both* ultimate equity ownership and other indicia of control of a licensee govern its consideration of when prior approval of a proposed transfer is required.

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12 *2000 Biennial Regulatory Review,* Report and Order, 17 FCC Rcd11416, 11420 (2002).

For example, in *Baton Rouge MSA Limited Partnership*,[13] a decision incorrectly relied on by Applicants in their Supplemental Opposition but clearly germane to the issue under discussion, the Common Carrier Bureau determined that the acquisition of 52 percent ownership of a cellular licensee in the form of limited partnership interests without prior Commission approval was a violation of the Commission's rules. Notwithstanding that it determined that no *de facto* transfer of control had taken place, since the general partner remained in control of the licensee, as a result of the unauthorized transfer of *de jure* ownership the Bureau held the licensee liable for a forfeiture and required that the licensee and the limited partner owning 52 percent of the entity file appropriate forms in order for the Commission to consider whether the transfer is in the public interest and should be granted.

Similarly, following issuance of the *FCBA Forbearance* Order, the Wireless Telecommunications Bureau and the International Bureau jointly reviewed the proposed investment by Telefonos de Mexico in a 50-percent interest in SBC International-Puerto Rico, the parent of a cellular licensee. The Bureaus determined that, because *de facto* control of the licensee would remain in SBC, they would treat Telefonos' 50-percent acquisition as a *pro forma* transfer. However, they held that, if Telefonos increased its ownership in the parent to more than 50 percent of the voting equity, prior Commission approval of the transaction would be required, regardless of whether SBC retained *de facto* control.[14] Thus, a *de jure* transfer of control in the absence of *de facto* control is *always* a transfer of control requiring prior Commission approval.

The Applicants' argument that the *de jure* transfer of control of DigiTel to GCI does not require prior Commission approval is based on a grossly flawed misapplication of the law. Here,

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13 9 FCC Rcd 561 (1994).

14 DA 99-2286, released October 22, 1999.

it is particularly outrageous for the Applicants to try to equate the acquisition by GCI of a 78 percent ownership in DigiTel – to which it was a previously unrelated party and competitor – to a form of internal reorganization or restructuring of DigiTel that would qualify as *pro forma* in nature.[15] Applicants are effectively trying to create a new legal standard. GCI's *de jure* control of DigiTel will be substantial and cannot be effected without prior Commission review and approval. As part of that review process, the Commission must examine whether the competitive impact of GCI's control of DigiTel's spectrum, facilities, and other resources will be in the public interest.

C. Consummation of the Transaction Would Also Result in *De Facto* Control of DigiTel by GCI

Applicants in their Supplemental Opposition seek to make much of the fact that MTA Wireless has not attempted to demonstrate that consummation of the Transaction will result in *de facto* control of DigiTel by GCI.[16] The simple answer to this observation is that MTA Wireless has no need to address the standards of *de facto* control. The unavoidable concession by Applicants that *de jure* control of DigiTel will pass to GCI as a result of its very large majority ownership interest ends the analysis as to whether prior Commission approval of the Transaction in accordance with established public interest standards is required. As pointed out above, Applicants seek to avoid such a consideration of the Transaction on its merits by contriving an argument that their proposed transfer of control will not be "substantial," thereby somehow obviating the Commission's need to consider its anti-competitive effects.

While continuing to deny its relevance, and without prejudice to its position that this proceeding is governed by the transfer of *de jure* control, MTA Wireless is, however, not

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15 *See* note 4 *supra* and examples cited by the Commission there of *pro forma* transfers of control.

16 Supplemental Opposition, at 9-10.

reluctant to submit the Applicants' agreements to review under the standards of *ex parte* control. *De facto* control is established essentially by evidence that the putative transferee "has the power to control or dominate management of the licensee," such evidence to be adduced on a case-by-case basis.[17] The documents produced in unredacted form in this docket and the surrounding circumstances of GCI's investment in DigiTel easily confirm, contrary to Applicants' bald assertion to the contrary,[18] that GCI will certainly exert control over the management of DigiTel and will be able to dictate the course of its operations. There would be no logical reason for GCI to enter into the Transaction were that not the case.

The Applicants cite to six indicia of control, originally identified in the *Intermountain Microwave* decision,[19] as governing the determination of whether a *de facto* transfer of control will occur in the instant case. In doing so, however, the Applicants reveal a critical misunderstanding of how the *Intermountain Microwave* factors are to be applied. The Applicants claim that MTA Wireless has "failed to make specific allegations of fact" demonstrating that GCI will have the power to constitute or appoint more than 50 percent of the DigiTel Board of Managers; the authority to appoint, promote, demote and fire senior DigiTel executives; responsibility for paying DigiTel's financial obligations; the ability to receive monies and profits from DigiTel's operations; and unfettered use of all of DigiTel's facilities and equipment.

In point of fact, the Commission has made clear that, in examinations of *de facto* control, the burden rests on the *licensee* to demonstrate that *it* will continue to have the power to exercise control over its own operations and facilities. This was demonstrated, for example, in the *Ellis*

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17 *FCBA Forbearance Order*, at 6297.

18 Supplemental Opposition, at 9.

19 24 Rad. Reg (P&F) 983, 984 (1963). *See* Supplemental Opposition, at 10.

Thompson Corporation proceeding, identified by Applicants as a "quintessential *Intermountain Microwave* case."[20] The Commission in *Ellis Thompson* designated for evidentiary hearing the question of whether *de facto* control of a cellular applicant had been transferred without prior Commission approval. In its order, the Commission held that "substantial and material questions" had been presented in the record as to whether a third party had become the real party-in-interest to the application. Significantly, it identified among these questions whether *the applicant* would be able to exercise unfettered use of its facilities, and whether *the applicant* would effectively control its own day-to-day operations.[21]

Thus, it is not for MTA Wireless, or ACS Wireless, or any other third party, to demonstrate, as the Applicants would like the Commission to believe, that a transfer of *de facto* control will occur; it is the *Applicants'* burden to convince the Commission that a transfer of *de facto* control will *not* occur. MTA Wireless submits that "substantial and material questions" have been presented in this proceeding that DigiTel will not be able to demonstrate that these indicia of control will be satisfied post-closing, and that an evidentiary hearing must be held on these issues if the Commission engages in a *de facto* transfer of control analysis (which MTA Wireless continues to maintain is not necessary).

In their pallid effort to make their case on the *Intermountain Microwave* standards, the Applicants rely on a single fact: that under the terms of the proposed post-closing Amended Operating Agreement for DigiTel, GCI will be able to name only one of five members of the licensee's Board of Managers, in whose hands management of the company is to be vested. However, when analyzed in the context of all the applicable factors in this proceeding, the

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20 9 FCC Rcd 7183 (1994)(hereinafter, "*Ellis Thompson*"). *See* Supplemental Opposition, n. 30.

21 *Ellis Thompson*, at 7140-41.

proposed management structure of the reorganized licensee will be recognized as an artificial construct, brashly elevating form over substance, designed to mask the true transfer of control to GCI that will take place.

In this regard, as the Commission has consistently reminded applicants,[22] the *Intermountain Microwave* indicia of licensee control are not intended to be exhaustive; instead, all the facts of the specific case must be considered when evaluating whether *de facto* control has transferred, and the factors governing whether actual control has transferred can vary with the circumstances of the particular case.[23] The specific facts adduced in the record in this proceeding to date manifestly demonstrate that GCI is entering into the Transaction with the intention of exercising effective control over DigiTel's management.

1. The factors specific to the present case.

The particular facts of significance to this proceeding are as follow:

(a) *GCI's substantial ownership interest in DigiTel.* GCI is making a multi-million-dollar investment in GCI in consideration for acquiring a 78 percent equity stake in the post-closing combined DigiTel-Denali entities. GCI would have the Commission believe that it is doing so as a "passive investor," for the munificent purpose of infusing capital in a competitor. This characterization of GCI's motivation is so commercially unreasonable that it lacks

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22 *2000 Biennial Regulatory Review NPRM*, at 24271; *FCBA Forbearance Order*, at 6297-98; *Ellis Thompson*, at 7139.

23 The Applicants' effort to have the Commission make a decision regarding the *future de facto* control of the licensee is particularly audacious. In the reported decisions applying *Intermountain Microwave* and other tests for actual control, the Commission has been able to make its decision based on established facts, typically after a transaction has been consummated and then challenged. Here, the Applicants ask that the Commission *assume* the facts based on the formal terms of contractual documents, without the benefit of a record as to how DigiTel will really be managed post-closing. This again demonstrates the incongruity of Applicants seeking prior Commission approval for a transfer of control while continuing to maintain that no transfer of control will actually take place.

credibility. Moreover, GCI has admitted in the Supplemental Opposition that

.[24] GCI's motivation in acquiring DigiTel, therefore, is clear: it is not to sit by as a passive investor in a wireless competitor, but instead it is to *acquire* that entity, and thereby gain the benefit of the competitor's spectrum, infrastructure, and existing services for its own purposes.

(b) *GCI has not deployed its own wireless system.* The record in this proceeding evidences that GCI has chosen not to deploy its own wireless system using the state-wide PCS spectrum that it has held for over a decade. It now requires a wireless offering in order to gain competitive advantage in the local exchange market -- for which it has recently received certification in Alaska – by offering bundled services. DigiTel will provide a vehicle for GCI to jumpstart its own state-wide operating system. In their Supplemental Opposition, the Applicants point out that, under the terms of its Distribution Agreement with Dobson,

,[25] and elsewhere alludes to its intention to develop a facilities-based system. This, again, provides evidence as to GCI's motivation for entering into the Transaction.[26]

(c) *GCI's option to acquire the remaining equity interests in DigiTel.* In addition to acquiring a large majority share of Common Units (*i.e.,* voting shares) in the post-closing DigiTel, GCI will

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24 Supplemental Opposition, at 21.

25 *Id.*, at 20; Agreement between Dobson and GCI dated July 26, 2004, .

26 Supplemental Opposition, at 16.

. Indeed, in *Ellis Thompson*, the Commission determined that it could be reasonably inferred that, in the expectation of a third party assuming legal control at a future date, the applicant permitted that third party to assume a dominant position with respect to the applicant's affairs.[29]

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28 As the owner of over 50 percent of the Common Units in DigiTel, GCI will have broad rights under section 16.1 of the DigiTel Amended Operating Agreement to amend the Agreement following the closing of the Transaction. Once GCI acquires 90 % of the outstanding Common Units, it will also be able to amend sections 7.1 and 7.2 addressing the structure and role of the Board of Managers.

29 *Ellis Thompson,* at 7143.

In response to this analysis, the Applicants are able to claim in their Supplemental Opposition only that

(d) *GCI will control the budget process of DigiTel.* MTA Wireless has already analyzed in its Supplementary Comments that the Amended Operating Agreement will give GCI effective veto rights over the adoption of DigiTel's budget. Given the central role of budget-making to the establishment of policy and of strategic decision-making for a company, this unilateral authority of GCI will substantially circumscribe the "exclusive" authority the Applicants claim the Board of Managers will have to manage DigiTel.[32]

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30 Supplemental Opposition, at 14.

31 Amended Operating Agreement, .

32 Supplemental Opposition, at 8. Recognizing the strong indication of GCI managerial power that the budget-controlling authority represents, the Applicants make a belated offer to modify this authority by agreeing that GCI's consent to the annual budget will "not be

(e) *GCI will retain substantial authority to circumscribe the decisions of the Board of Managers.* Similarly, while the Applicants seek to make much of the Amended Operating Agreement's delegation to the Board of Managers of "exclusive" management authority, in fact a full reading of the provision under which this authority is given reveals that GCI retains the right to control the Board's actions with regard to 14 major company operational and policy issues.[33] These decisions include the ability to restrict the Board from approving any deviation from the company's Annual Budget "of 10% or greater from an approved line item or budget category or to engage in any transaction which has not been budgeted for in the Annual Budget then in effect."[34] Since GCI will already have approval authority over the Annual Budget, the effect of this provision in combination with that of budgetary control will give GCI effective control over the company's business plan. Other provisions will accord GCI further significant financial control over the company, including the ability to veto any expenditure for assets over $250,000 not included in the Annual Budget; to sell, lease or dispose of any assets having any aggregate value over $250,000 except as approved in the Annual Budget; to incur any indebtedness other than for trade payables in the ordinary course of business; or to incur or guarantee any lien.[35] Indeed, GCI will even serve as the "Tax Manager Partner" for DigiTel following the closing.[36]

The Applicants predictably attempt to downplay this sweeping evidence of control by

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unreasonably withheld" (Supplemental Opposition, at 13-14). Given the other indicia of managerial control reflected in the Amended Operating Agreement, however, and

, this offer should make little difference to the Commission's consideration. In any case, the damage has been done: the *intent* of the Applicants for GCI to control the licensee's management post-closing is clear. The disclosure of that intent cannot be retracted.

33 Amended Operating Agreement, section 7.1

34 *Id.*, section 7.1[x].

35 *Id.*, section 7.1 [ii], [iii], and [ix].

36 *Id.*, sections 10.4, 10.9.

asserting "the Commission repeatedly has recognized that minority veto protection provisions of managerial decisions are not equal to maintaining control over the majority ownership of a company."[37] Given the fact that, in DigiTel's case, GCI *will* be the majority owner, these precedents can hardly be viewed as controlling here.[38] Indeed, the Commission has found that, under the proper circumstances, investment protection provisions may confer actual control on even a minority owner where they give it the power to dominate the management of the licensee's affairs.[39] Such clearly appears to be the case here where investment protection provisions have been granted to the *majority* owner that will also control the company's budget process.

(f) *GCI will be able to terminate the Management Agreement.* The Applicants assert that the award of a Management Agreement for DigiTel to principals of Denali and DigiTel materially influences the "totality of circumstances" of the present case, implying that this contract will somehow isolate true management control from GCI.[40] In point of fact, however, the authority of the managers under the Management Agreement is expressly made subject to the same limitations imposed by GCI's reservation of policy-making authority as are applicable to the Board of Managers.[41] In addition, GCI expressly retains the authority to terminate the Management Agreement at any time that it exercises its option to acquire the remaining

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37 Supplemental Opposition, at 13.

38 Moreover, the *Alaska Native Wireless* decision relied on for this proposition by the Applicants, 17 FCC Rcd 4231 (WTB 2002), applies the *Intermountain Microwave* standards to the Commission's attribution rules for designated entities. *See* section 1.2110(c)(2)(i)(A-C) of the Commission's rules. The policy considerations underlying the Commission's development of these standards are not directly applicable to the instant case, which does not involve any designated entity or entrepreneurial set-asides.

39 *See News International, PLC,* 97 FCC 2d 349, 355-56 (1984).

40 Supplemental Opposition, at 12.

41 *See* Amended Operating Agreement, section 7.1.

ownership interests in DigiTel.[42] As a result, the role of the Management Agreement as a determinative factor in this case is not entitled to material weight for the purposes proposed by the Applicants.

2. The relevant factors demonstrate that GCI will exercise *de facto* control of DigiTel

When analyzed in their entirety, the facts established in the record of this proceeding demonstrate that GCI, in addition to having *de jure* control of DigiTel, will exercise *de facto* control over the licensee. At a minimum, MTA Wireless has demonstrated that a material and substantial question has been presented on this issue.

Even if , the evidence of actual control of management is otherwise established. GCI has acknowledged in the Supplemental Opposition that

.[43] Given this fact, the Commission must assume that GCI will not be content in the role of

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42 Management Agreement, Art. 5.

43 *See* discussion in section 1(a) *supra.*

a passive investor, as the Applicants claim, but that it will play a pro-active role in directing the course of DigiTel's business decisions and the continued deployment of systems and services. GCI's extensive authority to control policy decisions of the Board of Managers is already spelled out in the Operating Agreement. The Applicants have conceded as much.[44] Under these circumstances, a serious question is presented regarding DigiTel's continuing ability to have "unfettered" access to its own facilities. As held by the Commission in *Ellis Thompson*, the intent of the parties to the proceeding must be weighed seriously in analyzing whether the licensee can assure the Commission that it will have such access.[45]

There is no question that GCI will benefit more than DigiTel's former owners from the earnings and profits of the licensee. The Amended Operating Agreement provides that profits or losses of the company "will be allocated to the Members in proportion to their Units."[46] As a 78 percent owner of the licensee, GCI will earn the lion's share of any profits.

It will similarly, under the Amended Operating Agreement, bear the risk of any losses of DigiTel. This is an equally important determinant of where actual control of the licensee will rest as between GCI and DigiTel's former owners. In *Ellis Thompson*, the Commission found the relative assumption of financial obligations to be a material determinant of where actual control of the licensee lies.[47] In the present case, the Applicants have described DigiTel as a financially stressed entity requiring GCI's cash infusion. GCI will also control DigiTel's ability to incur debt financing in any amount post-closing. These are all factors that the Commission

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44 *See* Supplemental Opposition, at 9.

45 *Ellis Thompson,* at 7140.

46 Amended Operating Agreement, section 5.2.

47 *Ellis Thompson,* at 7142.

has considered indicative of a third party's assumption of financial control and responsibility for a licensee.[48]

Indeed, here, the contractual documents confirm that GCI will exercise budgetary control and, in combination with its policy-setting authority, will effectively control the licensee's business plan, as well. These factors were held to be determinative of a *de facto* transfer of control in the *Baker Creek* order,[49] a decision which the Applicants acknowledge rested on an "exhaustive analysis of the record under each of the six *Intermountain Microwave* factors."[50]

In summary, as the Commission found in *Ellis Thompson,* the record in this proceeding strongly presents a "pattern of circumstances that raises a substantial and material question as to whether" DigiTel will permit GCI to gain actual control over it post-closing.[51] Even if the Commission determines that it must analyze the transfer of *de facto* control in this case, a principle MTA Wireless does not concede, the facts of this case make manifest that such a transfer to GCI will occur. Because the Applicants' case rests on their claim that no *de facto* transfer has occurred, MTA Wireless submits that the Commission should require the Applicants to produce at this time into the docket copies of all agreements between them, either currently in effect or having been in effect during the past twelve months, as a means of helping fill out the record in order to test this assertion.

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48 *See id.*, at 7141-42.

49 *Baker Creek Communications, L.P.*, 13 FCC Rcd 18709, 18719 (1998).

50 Supplemental Opposition, at 11.

51 *Ellis Thompson,* at 7142.

II. APPLICANTS HAVE FAILED TO REBUT MTA WIRELESS' DEMONSTRATION THAT SUBSTANTIAL AND MATERIAL QUESTIONS EXIST REGARDING THE PUBLIC INTEREST IMPACT OF THE TRANSACTION

A. GCI Will Control All 60 MHz of State-Wide PCS Spectrum If Applicants Are Permitted to Consummate the Transaction

In addition to having the Commission believe that it need not apply a full public interest analysis to the merger that will result from the Transaction because no real transfer of control will occur, the Applicants in Part II of their Supplemental Opposition submit that, since DigiTel will post-Transaction remain an independent operating entity, the Commission may not conclude that GCI will have control over all 60 MHz of the state-wide PCS licenses in Alaska.[52] As demonstrated in Part I of this Reply, however, the Transaction will result in both *de jure* **and** *de facto* control of the combined DigiTel/Denali entity by GCI. Therefore, the Commission must, for purposes of its public interest analysis, assume, both as a matter of law and as a matter of practicality, that GCI will control the reorganized DigiTel's licenses, and that all 60 MHz of PCS state-wide spectrum must be aggregated for purposes of this evaluation.

B. GCI's Relationship with Dobson Indicates Horizontal Coordination Between Surviving Major Competitors in the Relevant Market

The Applicants' Supplemental Opposition adds little of substance to the debate regarding the role of GCI's relationship with Dobson in the Commission's consideration of the anti-competitive impact of the Transaction. In its Supplementary Comments,[53] MTA Wireless provided an extended review and analysis of why the working agreement between GCI and Dobson reflects an extraordinarily broad range of cooperative activities between major competitors in the Alaska wireless market, . Yet, the

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52 Supplemental Opposition, at 12-13.

53 Supplementary Comments, at 9-18. MTA Wireless incorporates and reaffirms the analysis from its Supplementary Comments in its entirety in the discussion which follows.

Applicants continue to characterize this agreement as nothing more than a "normal resale arrangement."[54] Notwithstanding the Applicant's protestations to the contrary, the Commission's own review of this key document will vindicate MTA Wireless' characterization.[55]

Rather than attempt to rebut MTA Wireless' analysis on its specific points, the Applicants point out the various ways in which the agreement prevents GCI from acting as an aggressive competitor in the market

.[56] If these characterizations are correct, one is left with the obvious question of why would GCI have gone to the effort of engaging in such a relationship?

Most importantly, however, GCI misstates MTA Wireless' position by attempting to demonstrate that specific terms of the Dobson agreement do not reflect that Dobson is being "controlled" by GCI.[57] MTA Wireless has not attempted to claim that GCI is in a position to "control" the largest wireless carrier in the Alaska market. Instead, MTA Wireless has argued, and continues to argue, that the broad relationship between Dobson and GCI is evidence of coordinated activities between these competitors which justifies the Commission, when making its public interest analysis of the Transaction, to aggregate all wireless spectrum licensed to Dobson, and otherwise under its control, with that which will be subject to GCI's control post-Transaction. Similarly, MTA Wireless' argument that Dobson's spectrum is relevant to the

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54 Supplemental Opposition, at 4.

55 Significantly, the major contractual relationship between Dobson and GCI is entitled simply "Agreement,"

56 Supplemental Opposition, at 17-18.

57 Supplemental Opposition, at 18-19.

Commission's analysis rests not on GCI's role as a "reseller," but on the fact the parties' Agreement goes materially beyond that of a normal resale arrangement.

In its analysis of the competitive affects of wireless mergers, the Commission has applied the Department of Justice/FTC Merger Guidelines,[58] which instruct that horizontal contraction of the competitors in a market (which will clearly result from GCI's acquisition of DigiTel) can result in two forms of anticompetitive harm: first, through the unilateral actions of the merged entity, and second through "coordinated interaction among the remaining firms competing in the market.[59] As the guidelines indicate and this Commission has recognized, coordinated efforts occur when the remaining firms in the market, recognizing their interdependence, take actions that are profitable for each of them (and harmful for consumers) only as a result of accommodating the reactions of one another. Examples of such coordinated effects can include explicit collusion, tacit collusion and price leadership. The fewer the remaining firms in the market, the more likely it is that coordinated efforts will result.

In the Anchorage (and Alaska state-wide) market, the elimination of DigiTel through its acquisition by GCI will leave three major competitors, thereby creating conditions conducive to the form of coordinated activity that the Commission seeks to identify and eliminate. Given the specialized nature of the Alaska market, geographically isolated from the "Lower 48" states, MTA Wireless submits that the prospect for coordinated activity among the three leading state-wide CMRS licensees should be accorded particularly careful scrutiny.

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58 Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, issued April 2, 1992; revised April 8, 1997 (hereinafter, "*DOJ/FTC Guidelines*"). *See Applications of Western Wireless Corporation and ALLTEL Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 20 FCC Rcd 13053 (2005)("*Western Wireless-ALLTEL Order*"), at 13075; *AT&T Wireless-Cingular Order*, at 21580.

59 *Id.*, section 2.1.

When greater transparency exists for competitors to know and track one another's prices and other terms of competition, the likelihood for coordinated activity increases.[60] Here, MTA Wireless submits that the GCI-Dobson agreement will

. Moreover,

the *DOJ/FTC Guidelines* recognize that, when competitors are used to cooperating with one another, the increased likelihood of coordinated anticompetitive activity cannot be overlooked.[61] Accordingly, the existence of the GCI-Dobson agreement is significant to the Commission's consideration of the public interest not only because it might reflect on GCI's ability to take unilateral anticompetitive action following the acquisition, but on the ability of GCI and Dobson to engage in coordinated activity, tacit or otherwise. As the only other major competitor in the market, ACS Wireless could, under these circumstances, feel the competitive pressure to acquiesce in at least tacit coordinated activity.

It is for these reasons that the existence and specific terms of the contractual relationship between GCI and Dobson is relevant to the Commission's public interest evaluation, and why such terms warrant close scrutiny and understanding. Moreover, it is for these reasons that the spectrum controlled by Dobson

must all validly be aggregated by the Commission with the spectrum that GCI will otherwise control for purposes of considering the possible anticompetitive effects of the transaction.

In summary, GCI's relationship with Dobson is far from "nothing out of the ordinary," as the Applicants dismissively allege.[62] GCI has held a state-wide PCS license for over a decade,

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60 *Western Wireless-ALLTEL Order*, at 13087.

61 *DOJ/FTC Guidelines,* section 2.1.

62 Supplemental Opposition, at 22.

yet has not deployed its own system. It now has entered into a broad cooperative arrangement with its major wireless competitor, Dobson,

. At the same time, it seeks to consummate a separate agreement to acquire control of another wireless competitor with a system deployed throughout much of the state. This is anything but "ordinary" competitive behavior. MTA Wireless submits that this series of relationships in which GCI is engaged involving both DigiTel/Denali and Dobson must be considered as part of the "totality of circumstances" that the Commission will weigh in evaluating whether consummation of the Transaction will be in the public interest.

C. The Sprint Agreements

As indicated above, DigiTel has provided counsel for MTA Wireless and ACS Wireless copies of the two Sprint Agreements subject to the terms of the Commission's protective order for documents produced by the Applicants pursuant to order of the Commission.[63]

63 As of this writing, there is no indication that DigiTel has submitted the Sprint Agreements into the docket, as was done with all other documents produced by the Applicants pursuant to the terms of the protective order and subsequent agreements of the parties. This situation, if it persists, could become awkward, as the Commission would not itself have access to these documents. MTA Wireless suggests that the Commission request DigiTel to produce these documents into the docket, subject to the terms of the protective order.

The answer to the question thus presented could prove relevant to the Commission's evaluation of whether and to what extent the Transaction may encourage horizontal coordinated activity among the state-wide operators in the Alaska market.

D. The Auctioning of AWS Spectrum Has No Practical Impact on the Assessment of Spectrum Aggregation in this Proceeding

The Applicants seek to make much of the fact that MTA Wireless is a participant in the current auction for AWS spectrum being conducted by the Commission, asserting that this activity provides it with "actual and immediate capability to buy substantial spectrum capacity and to provide additional facility-based competition throughout Alaska."[72] It is doubtful that Applicants take their own hyperbole on this subject seriously.

MTA Wireless does not deny that it is taking responsible steps to acquire long-term spectrum resources to support and grow its services by participating in Auction 66.[73] As MTA Wireless has already explained in an earlier filing, however, the AWS spectrum, and equipment with which it can be used, are not expected to become commercially useful for four to five years.[74] For a small competitor like MTA Wireless, this is simply too long a period for it to survive and compete, given the geographically limited spectrum and restricted roaming agreements to which it has access. Thus, the AWS spectrum can by no stretch of the imagination

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72 Supplemental Opposition, at 3.

73 Applicants note for the Commission's benefit that none of them is currently a participant in the AWS auction. What they fail to disclose, however, is that, as of Round 14, Dobson is actively competing in the auction for Alaska properties through a number of entities doing business as American Cellular Corporation, and has bid against MTA Wireless in some instances. *See* attached Declaration of Richard Kenshalo dated September 6, 2006 ("Kenshalo Declaration"), ¶¶ 3,6.

74 *See* Kenshalo Declaration, ¶¶ 3-5. *See also* MTA Wireless Reply to Joint Opposition to Petition to Deny, at 11-12, and accompanying Declaration of Richard Kenshalo date March 13, 2006, ¶¶ 8-10.

be considered to provide any auction competitor "actual and immediate capability...to provide additional facility-based competition."

As a result, the 90 MHz of AWS spectrum that will eventually come into the marketplace, therefore, cannot realistically be considered for purposes of this proceeding, in addition to the 200 MHz of mobile telephony spectrum that is currently operationally deployed. Indeed, the Commission has already recognized this fact and has so held in recent analyses of the anticompetitive effects of mergers in the wireless sector.[75] The spectrum aggregation effects of Applicants' Transaction should continue to be considered on the basis of the input market comprised solely of cellular, PCS and SMR spectrum.

III. APPLICANTS' EFFORT TO PRECLUDE ACS WIRELESS' PARTICIPATION IN THIS PROCEEDING IS GROUNDLESS AND DOES NOT SERVE THE PUBLIC INTEREST

In their August 4, 2006 letter to the Commission ("August 4 Letter"), the Applicants ask that the Commission reject the ACS Wireless Filing submitted on July 21, 2006 on the ground that it is an untimely petition to deny the Applications. MTA Wireless finds this an unfortunate effort by the Applicants to restrict the public dialogue on the merits of their Applications. Moreover, it totally contradicts and defies the Commission's own establishment of this docket as a permit-but-disclose proceeding in its June 9 Public Notice.[76] The Commission did not put any restrictions in that Public Notice on what entities qualified as commenting parties in this proceeding or any time frame within which *ex parte* submissions could be made to the Commission.

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75 *See Western Wireless-ALLTEL Order*, at 13071, n. 127.

76 Public Notice, *ExParte* Status of Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc., DA 06-1247, released June 9, 2006.

The procedural and substantive deficiency of the Applicants' position on this matter is fully laid out in ACS Wireless' letter to the Commission dated August 9, 2006, the contents of which MTA Wireless hereby endorses. MTA Wireless also agrees with and endorses ACS Wireless' rebuttal, in its August 14 , 2006 letter to the Commission, of the Applicants' argument that GCI's control over fiber-optic transport capacity between Alaska and the "Lower 48" states should not be considered as part of the Commission's public interest determination.[77] In addition, MTA Wireless notes as follows:

1. MTA Wireless believes that ACS Wireless, a substantial operator in the Anchorage and Alaska state-wide markets, has more than adequately demonstrated its standing as an interested party to this proceeding. Moreover, ACS Wireless brings valuable insights and perspectives to the competitive issues joined in this proceeding which MTA Wireless might not be in a position to develop independently. As a result, ACS Wireless' participation in this proceeding will help develop a full and meaningful record for the Commission to decide how to dispose of the Applications. Acceptance of the Applicants' baseless opposition to such participation would do damage to the public interest.

2. The Applicants claim that the Commission can dismiss the ACS Filing "comfortable that no substantive issues of any significance have been raised."[78] If that is the case, then surely there can be no harm to allowing ACS' submissions into the record. What is it that Applicants are attempting to keep from the Commission's consideration?

3. As MTA Wireless has repeatedly demonstrated in its pleadings in this proceeding, substantial and material questions are presented by the record that the Applicants' Transaction will not serve the public interest, and that it will be harmful to it. These questions should

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77 *See* MTA Wireless Comments on ACS Wireless Filing, August 2, 2006, at 3.

78 August 4 Letter, at 3.

properly be resolved in an evidentiary proceeding. If such an evidentiary proceeding is designated, MTA Wireless urges that the Commission accept ACS Wireless' petition to intervene, and grant ACS Wireless intervention in the evidentiary hearing.

4. MTA notes with irony that the Applicants invoke in support of their opposition to the ACS Wireless Filing the Commission's policy of "minimizing administrative delay" in the processing of applications to support "the movement of spectrum toward new, higher valued uses."[79] Unfortunately, the behavior of GCI, the putative transferee in this proceeding, is anything but consistent with the Commission's effort to promote, through secondary markets and streamlined assignment and transfer policies, more and better use of scarce spectrum resources for the benefit of consumers. As articulated by the Commission in its Policy Statement in the *Secondary Markets* proceeding alluded to in the August 4 Letter:

> "Our goal in this effort is to promote the operation of competitive markets for the sale and lease of spectrum usage rights by licensees, and thereby facilitate both the transfer of the right to use spectrum for existing services to new, higher valued uses and the availability of unused and underutilized spectrum to those who would use it for providing service. We also seek to foster market structures and incentives that will encourage more sellers to make spectrum available. This will bring unused spectrum to the market, allow sellers to apply the resource value of that spectrum to other aspects of their business, and provide buyers with more opportunities for choice in frequencies and service areas and lower prices."[80]

In stark contrast to this important policy objective, GCI has hoarded 30 MHz of state-wide spectrum for over a decade, without making any effort to deploy it for the mobile service it was originally intended, and without offering it for lease to other potential users, like MTA Wireless. Only recently, when it faced the need to fulfill its license buildout obligation, did GCI enter into a lease arrangement with Dobson that was

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79 *Id.*, at 1.

80 *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178, 24185-86 (2000).

intended, in part, to satisfy that responsibility without expenditure of GCI's own resources. Only now, when it sees the need to offer a bundled service to promote its local exchange service offering, has GCI entered the market with its own branded wireless service, and then on a resale basis, rather than through the use of its own spectrum and facilities. And now, after a history of underutilization of its own spectrum, GCI seeks to acquire control of a competitor's operational system and to encourage the Commission to approve that acquisition on a streamlined basis, without consideration of its competitive implications.

5. Finally, MTA Wireless notes that, notwithstanding their rhetoric regarding the alleged disruptions and delays that will be caused by ACS Wireless' participation, the Applicants have been forced to recognize the inevitability of ACS Wireless, and other interested parties like it, having their say in the context of the Commission's permit-but-disclose docket. In the procedural agreement recently reached among ACS Wireless and the other parties in this proceeding,[81] the Applicants agreed not only to grant counsel for ACS Wireless access to their confidential documents pursuant to the terms of the Commission's protective order, but agreed to a schedule for ACS Wireless, as well as MTA Wireless, to file further comments on the Applicants' pleadings and those documents. While the Applicants preserved in that agreement their right to oppose ACS Wireless' party status to this proceeding, it would appear in light of this development to make little practical sense for the Commission to avoid considering the views of this record expressed by ACS Wireless

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81 *See* agreement attached to letter from Michael Lazarus, counsel for GCI, to Marlene Dortch, dated August 24, 2006, WT Docket 06-114.

CONCLUSIONS

1. The Transaction will result in both *de jure* and *de facto* transfer of control of the reorganized DigiTel to GCI. The Applicants have failed to identify any public interest benefit for their proposed Transaction, whereas MTA Wireless and ACS Wireless have demonstrated the likelihood of anticompetitive impact in the Alaska market resulting from consummation of that transaction. MTA hereby reaffirms its petition that the Applications be denied.

2. Alternatively, the Commission must, at a minimum, accept the fact that material and substantial questions exist in the record regarding the public interest benefits of the Transaction. If the Commission does not deny the Applications outright, it should designate them for evidentiary hearing to determine whether the potential harms to the public interest will outweigh the public benefits.

3. The evidentiary hearing should proceed on the basis that the Transaction will, as a matter of law, result in a *de facto* transfer of control of the reorganized DigTel to GCI.

4. The Applicants would bear the burden of proof in such hearing that the potential benefits to the public interest outweigh the potential harms.

5. The relevant market for analysis would be the Anchorage BTA and, secondarily, the Alaska state-wide mobile telephony market.

6. If the Commission concludes that it is necessary to determine whether *de facto* control has transferred as a result of the Transaction, MTA Wireless submits that such a determination would require full Commission participation, as it would establish a new principle of law. In that case, the evidentiary hearing should address, at a minimum, the following cogent issues which will assist in the determination of the public interest:

(a) Taking into account all the particular facts of this case, can Applicants demonstrate that consummation of the Transaction will not result in a *de facto* transfer of control of DigiTel/Denali?

(b) What harms or benefits to the public interest in the relevant market will result from consummation of the Transaction?

(c) Is the agreement between GCI and Dobson a "normal reseller arrangement"?

(d)

(e) What is the effect of GCI's failure to develop its own licensed spectrum for the provision of mobile telephony services over the last decade?

(f) What impact will GCI's control over special access transport prices on fiber optic routes between Alaska and the "Lower 48" states have on GCI's ability to restrict competition in the roaming market?

7. The Commission should order the Applicants to file in the docket copies of any and all additional agreements between them, not already produced, in effect either currently or at any time during the last 12 months.

8. The Commission should treat ACS Wireless as a party for all purposes in this proceeding.

Respectfully submitted

MTA COMMUNICATIONS, INC., d/b/a
MTA WIRELESS

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Its Counsel

September 6, 2006

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for the Assignment of Licenses from	)	
Denali PCS, LLC to Alaska DigiTel, LLC and	)	WT Docket No. 06-114
the Transfer of Control of Interests in Alaska	)	
DigiTel, LLC to General Communication, Inc.	)	

DECLARATION OF RICHARD KENSHALO

I, Richard Kenshalo, with offices located at 1740 S. Chugach Street, Palmer, Alaska 99645, do hereby state and declare as follows:

1. As stated in my previous declarations in this proceeding, I am the Director, Planning and Business Development, of Matanuska Telephone Association, Inc. ("Matanuska Telephone"). MTA Wireless is a wholly owned subsidiary of Matanuska Telephone, a rural cooperative local exchange provider.

2. Reference is hereby made to my declaration in this proceeding dated March 13, 2006 ("March Declaration"), the contents of which I hereby reaffirm and incorporate by reference.

3. MTA Wireless is participating in the Federal Communications Commission's Auction 66 for AWS spectrum in an effort to secure long-term spectrum resources to help overcome the competitive disadvantages and limitations identified in my March Declaration. MTA Wireless' business plan, however, assumes that AWS spectrum will not become operationally available for its purposes for at least four years, and possibly longer.

4. If MTA Wireless is unable to gain access to additional wireless spectrum during the intervening period while it awaits the availability of AWS spectrum, competitors like GCI, with access to spectrum that is presently unencumbered, and with the ability to leverage existing network and technology investments, will be able to overbuild in MTA Wireless' service area. Several competitors have already started to do so. This will place MTA Wireless at a significant competitive disadvantage since, without access to additional available spectrum of its own, it will not have the option of building network infrastructure in larger competitors' wider service areas, and will be increasingly forced to depend on voice and, more importantly, data roaming arrangements with competitors.

5. With the rapid growth of wireless services and applications and the decline in landline utilization as more households abandon such service, a four-year or longer delay in entry into broader geographic markets will be difficult, if not impossible, for MTA Wireless to sustain. The weakening or loss of MTA Wireless during this time period as a competitor in the wireless sector would lessen competition in the Alaska market, thereby causing harm to subscribers.

6. Dobson Cellular Systems, through an affiliate called American Cellular Corporation, has entered the AWS auction in a number of Alaska markets. In several instances, American Cellular has bid against MTA Wireless in the auction.

Under penalty of perjury, the foregoing is a true and accurate statement, to the best of my information, knowledge and belief.

9/06/06
Date

Richard Kenshalo

CERTIFICATE OF SERVICE

I, Stefan M. Lopatkiewicz, hereby certify that copies of the foregoing Reply to Applicants Filing of MTA Communications, Inc. d/b/a MTA Wireless and the attached Declaration of Richard Kenshalo were served electronically and by U.S. mail, postage prepaid, on the 6th day of September, 2006, on:

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